Majlis Peguam v Poh Fook Yuen & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-186 OF 2010
SURIYADI, JEFFREY TAN AND ABDUL WAHAB PATAIL JJCA
2 MARCH 2012

Civil Procedure — Intervention — Application for — Disciplinary Board appointing Disciplinary Committee to investigate complaint against respondents — Respondents obtaining injunction to prevent complainants from taking further proceedings against respondents — Whether Majlis Peguam could intervene and to vary injunction — Whether Majlis Peguam a 'party aggrieved'

Legal Profession — Malaysian Bar — Legal entity — Malaysian Bar a body corporate represented by Majlis Peguam — Whether Majlis Peguam 'party aggrieved' when Disciplinary Board prevented from carrying out its responsibilities

Legal Profession — Professional discipline — Disciplinary Committee — Disciplinary Board ('DB') — DB appointing Disciplinary Committee to investigate complaint against respondents — Respondents obtaining injunction to prevent complainants from taking further proceedings against respondents — Whether Majlis Peguam could intervene and to vary injunction — Whether Majlis Peguam had locus standi — Legal Profession Act 1976 ss 41, 42, 47, 93(1), (2) & 103E

Ramasamy a/l Krishnan and Selvarajah a/l Krishnan ('the complainants') had written to the advocates and solicitors Disciplinary Board ('DB') to lodge a complaint in respect of the first respondent's actions as an advocate and solicitor practicing at the second respondent law firm. Acting upon the complaint, the DB appointed a Disciplinary Committee ('DC') to hear and to investigate the complaint. The respondents subsequently filed a writ of summons against the complainants and obtained a judgment in default to the effect that the complainants were restrained from publishing defamatory statements against the respondents. The complainants were also restrained from taking any further steps or proceedings against the respondents. The respondents relied upon the judgment to restrain the DC from hearing and investigating the complaint on the grounds that the DC would be in breach thereof. The Majlis Peguam therefore applied to intervene and to vary the orders. The High Court dismissed the application on the grounds that the Majlis Peguam had failed to show how its legal and statutory rights had been affected. The learned judge also held in light of ss 93(1), (2) and 10E of the

Legal Profession Act 1976 ('the Act'), it should be the DB and not the Majlis Peguam who should have made the applications. The Majlis Peguam filed this appeal against that decision.

Held, allowing the appeal with costs:

(1) By virtue of s 41 of the Act, the legal entity, ie the body corporate, is the Malaysian Bar. The only body that may undertake and defend legal action for and against the Malaysian Bar is the Malaysian Bar, represented by the Majlis Peguam pursuant to ss 42 and 47. The Majlis Peguam of the Malaysian Bar is no less a 'party aggrieved' when the DB of the Malaysian Bar is prevented from carrying out its responsibilities than a party who is denied a right he is entitled to (see para 10).

(2) It was clear that the injunction was to prevent the DB from acting upon and the DC from investigating the complaint. The Majlis Peguam ought therefore to have been made a party. This was more so when the only party appearing before the learned judge were the respondents themselves. That the complainants were lackadaisical in the court proceedings or chose not to defend their legal rights in the court were irrelevant to the consideration of the application to amend the orders to enable the DB and the DC of the Malaysian Bar to carry out their statutory responsibilities to investigate and if warranted, to act upon a complaint by the complainants to the DB (see paras 12–13).

[Bahasa Malaysia summary

Ramasamy a/l Krishnan dan Selvarajah a/l Krishnan ('pengadu-pengadu') telah menulis kepada peguambela dan peguamcara Lembaga Tatatertib ('LT') untuk membuat aduan berkaitan tindakan-tindakan responden pertama sebagai peguambela dan peguamcara yang mengamal undang-undang di firma undang-undang responden kedua. Bertindak atas aduan tersebut, LT melantik Jawatankuasa Tatatertib ('JT') untuk mendengar dan menyiasat aduan tersebut. Responden-responden kemudiannya memfailkan writ saman terhadap pengadu-pengadu dan memperolehi penghakiman ingkar sehingga menyebabkan pengadu-pengadu dihalang daripada menerbitkan penyataan-penyataan fitnah terhadap responden-responden. Pengadu-pengadu juga dihalang daripada mengambil apa-apa langkah selanjutnya atau prosiding terhadap responden-responden. Responden-responden bergantung ke atas penghakiman tersebut untuk menghalang JT daripada mendengar dan menyiasat aduan atas alasan-alasan bahawa JT akan memungkirinya. Majlis Peguam oleh itu memohon untuk mencelah dan mengubah perintah-perintah tersebut. Mahkamah Tinggi menolak permohonan tersebut atas alasan bahawa Majlis Peguam telah gagal untuk menunjukkan bagaimana hak undang-undang dan statutorinya terjejas. Hakim yang bijaksana juga memutuskan berdasarkan ss 93(1), (2) dan 103E Akta Profesion Undang-Undang 1976 ('Akta'), sepatutnya adalah LT dan

bukan Majlis Peguam yang patut membuat permohonan-permohonan tersebut. Majlis Peguam memfailkan rayuan ini terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mengikut s 41 Akta, entiti undang-undang iaitu pertubuhan perbadanan, adalah Badan Peguam Malaysia. Satu-satunya pertubuhan yang boleh menjalankan dan membela tindakan undang-undang untuk dan terhadap Badan Peguam Malaysia adalah Badan Peguam Malaysia, diwakili oleh Majlis Peguam berikutan ss 42 dan 47. Majlis Peguam Badan Peguam Malaysia adalah 'party aggrieved' apabila LT Badan Peguam Malaysia dihalang daripada menjalankan tanggungjawab-tanggungjawabnya daripada pihak yang dinafikan hak yang dia berhak kepadanya (lihat perenggan 10).

(2) Adalah jelas bahawa injunksi adalah untuk menghalang LT daripada bertindak dan JT daripada menyiasat aduan tersebut. Majlis Peguam oleh itu patut dijadikan pihak. Ini adalah lebih penting apabila satu-satunya pihak yang berada di hadapan hakim yang bijaksana adalah responden-responden sendiri. Kekurangan pengadu-pengadu di dalam mahkamah prosiding atau memilih untuk tidak membela hak undang-undang mereka di dalam mahkamah tidak relevan kepada pertimbangan terhadap permohonan untuk meminda perintah-perintah untuk membolehkan LT dan JT Badan Peguam Malaysia untuk menjalankan tanggungjawab-tanggungjawab statutori mereka untuk menyiasat dan jika mewajarkan, untuk bertindak ke atas aduan oleh pengadu-pengadu kepada LT (lihat perenggan 12–13).]

Notes

For a case on disciplinary committee, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) para 1733.

For cases on application for intervention, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4089–4091.

Cases referred to

Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1; [2008] 4 CLJ 317, FC (refd)

Legislation referred to

Legal Profession Act 1976 ss 1(a), (b), (c), (e), (g), 41, 42, 47, 57(b), (c), 93(1), (2), 103E, 137, 137(1)

Appeal from: Civil No ST–23–132 of 2008 (High Court, Kuala Lumpur)

Alvin Julian (V Anil Raj with him) (Bodipalar Ponnudurai De Silva) for the appellant/intervener.

Mahadzir bin Nasaruddin (Poh Mahadzir & Co) for the respondents/plaintiffs.

Abdul Wahab Patail JCA (judgment of the court):

[1] The appellant, the Majlis Peguam of Malaysia was a proposed intervener in the High Court. Its appeal is against the whole decision of the learned judicial commissioner in the High Court of Malaya given on 11 December 2009 dismissing its application made on 16 June 2009 for leave to intervene and to vary an order and a judgment obtained on 22 December 2008 (collectively referred to as 'the orders').

BACKGROUND

[2] On 30 October 2007, Ramasamy a/l Krishnan and Selvarajah a/l Krishnan had written to the Advocates & Solicitors Disciplinary Board ('DB') to lodge a complaint ('the complaint') in respect of one Poh Fook Yuen, the first respondent herein, in respect of the latter's actions as an advocate and solicitor practicing at Tetuan Poh Mahadzir & Company, the second respondent, a law firm. Acting upon the complaint, the DB appointed a Disciplinary Committee ('DC') to hear and to investigate the complaint.

[3] On 5 August 2008, the respondents filed as plaintiffs a writ of summons and on 21 October 2008 a summons in chambers to seek a judgment in default of appearance against Ramasamy a/l Krishnan and Selvarajah a/l Krishnan. Pursuant to the writ and the summons in chambers, the respondents obtained the orders on 22 December 2008 as follows:

> A: 'PERINTAH'
>
> ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 21hb Oktober, 2008 (Lampiran 3) yang disokong oleh Afidavit Sokongan Mahadzir Bin Nasaruddin yang diikrarkan pada 21hb Oktober, 2008 kesemuanya difailkan di sini DAN SETELAH MENDENGAR Encik KC Tang bersama-sama dengan Encik Mahadzir Bin Nasaruddin, Peguamcara bagi pihak Plaintif-Plaintif MAKA ADALAH DIPERINTAHKAN seperti berikut:
>
> (1) Bahawa Defendan-Defendan ditahan samada secara diri mereka sendiri, melalui pegawainya, pekerjanya dan/atau ejennya atau yang lain dalam apa jua cara pun daripada melakukan penyiaran, pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif melalui suatu surat Defendan-Defendan bertarikh 30hb Oktober, 2007 kepada Lembaga Tatatertib Peguam-peguam (selepas ini dirujuk sebagai 'Surat tersebut');

(2) Selanjutnya atau secara alternatifnya, sekiranya penyiaran dan/atau pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama telah dilakukan oleh Defendan-Defendan ke atas Plaintif-Plaintif, maka Defendan-Defendan dihalang sama ada dengan diri sendiri atau melalui wakilnya, ejennya atau mana-mana satu daripada mereka atau dengan apa jua cara:

(i) dari mengambil apa-apa langkah selanjutnya dan/atau prosiding dalam apa-apa bentuk dan/atau apa cara dalam penyiaran, pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif: dan

(ii) dari menyiarkan dan/atau menyebarkan dan/atau mendedahkan dalam apa-apa cara tentang kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif kepada mana-mana pihak lain;

(3) Ganti rugi am ke atas kesengsaraan yang dialami oleh Plaintif-Plaintif setelah penyiaran Surat tersebut yang akan ditaksirkan oleh Mahkamah Yang Mulia ini; dan

(4) Kos permohonan ini ditanggung oleh Defendan-Defendan.

B: 'PENGHAKIMAN'

Tiada kehadiran telah dimasukkan oleh Defendan-Defendan dalam guaman ini DAN ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 21 hb Oktober, 2008 (Lampiran 3) yang disokong oleh Afidavit Sokongan Mahadzir Bin Nasaruddin yang diikrarkan pada 21 hb Oktober, 2008 kesemuanya difailkan di sini DAN SETELAH MENDENGAR Encik KC Tang bersama-sama dengan Encik Mahadzir Bin Nasaruddin peguamcara bagi pihak Plaintif-Plaintif dan Defendan-Defendan tidak hadir walaupun setelah diserahkan dengan sesalinan termeterai Saman Dalam Kamar dan Afidavit Sokongan Mahadzir Bin Nasaruddin;

MAKA ADALAH PADA HARI INI DIHAKIMKAN bahawa seperti berikut:

(1) Bahawa Penghakiman Ingkar Pembelaan dimasukkan oleh Plaintif-Plaintif terhadap Defendan-Defendan;

(2) Bahawa Defendan-Defendan ditahan samada secara diri mereka sendiri, melalui pegawainya. Pekerjanya dan/atau ejennya atau yang lain dalam apa jua cara pun daripada melakukan penyiaran, pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif melalui suatu surat Defendan-Defendan bertarikh 30hb Oktober, 2007 kepada Lembaga Tatatertib Peguam-Peguam (selepas ini dirujuk sebagai 'Surat tersebut');

(3) Selanjutnya atau secara alternatifnya, sekiranya penyiaran dan/atau pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama telah dilakukan oleh Defendan-Defendan ke atas Plaintif-Plaintif, maka Defendan-Defendan dihalang sama ada dengan diri sendiri atau melalui wakilnya, ejennya atau mana-mana satu daripada mereka atau dengan apa jua cara:

(i) dari mengambil apa-apa langkah selanjutnya dan/atau presiding dalam apa-apa bentuk dan/atau apa cara dalam penyiaran. pencetakan atau menyebabkan penyiaran, pencetakan kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif; dan

(ii) dari menyiarkan dan/atau menyebarkan dan/atau mendedahkan dalam apa-apa cara tentang kenyataan-kenyataan yang didakwa di dalam Surat tersebut atau apa-apa perkataan lain yang sama atau mempunyai efek fitnah yang sama terhadap Plaintif-Plaintif kepada mana-mana pihak lain;

(4) Ganti rugi am ke atas kesengsaraan yang dialami oleh Plaintif-Plaintif setelah penyiaran surat tersebut yang akan ditaksirkan oleh Mahkamah Yang Mulia ini; dan

(5) Kos permohonan ini ditanggung oleh Defendan-Defendan.

[4] Having obtained the orders on 22 December 2008 against Ramasamy a/l Krishnan and Selvarajah a/l Krishnan, the respondents served the draft of the orders on the DC on 17 February 2009. The order and judgment as evident from the draft of the orders were relied upon by the respondents to restrain the DC from hearing and investigating the complaint on the grounds that the DC would be in breach of the orders. Concluding that the orders were wide enough to preclude the defendants from reiterating their complaints based on their letter dated 30 October 2007, the DC decided on 17 February 2009 not to proceed with the hearing and investigation of the complaint. This is evident from the letter by Darryl SC Goon as Chairman of the Disciplinary Committee. Although the letter is dated 27 February 2008, and referred to service of the draft of the orders on 17 February 2008, we are satisfied the year 2008 was an error euphemistically described as typographical error. Nevertheless the lack of due care should not have happened. The year should be 2009, not 2008.

[5] On 16 June 2009, the Majlis Peguam filed its applications by summons in chambers to intervene and to vary the orders. Its applications were dismissed by the High Court on 11 December 2009.

[6] While accepting the submissions on behalf of the Majlis Peguam as to the tests for intervention, learned judge held that, on the facts and considering the provisions of the Legal Profession Act 1976, the Majlis Peguam had failed to show how its legal and statutory rights have been affected. Learned judge held that s 57(b) and (c), s 42, s 1(a), (b), (c), (e) and (g) of the Legal Profession Act 1976 did not apply in this case. It was held by the learned Judge that in light of ss 93(1) and (2) and 103E, it should be the DB and not the Majlis Peguam who should make the applications. On the facts the learned judge held that Ramasamy a/l Krishnan and Selvarajah a/l Krishnan had not taken any steps to set aside the orders, that they had been lackadaisical in their defence and it begged the question whether they were really serious in pursuing their complaint. On these grounds, the learned judge held he was therefore of the view that the right vests only in the DB and the Majlis Peguam had failed to disclose a legal interest or any statutory provision that conferred a right on the Majlis Peguam to intervene in the proceedings.

[7] On the question of locus, as to whether it is the DB and not the Majlis Peguam who should have made the application to intervene, the starting point is that by virtue of s 41 of the Legal Profession Act 1976, the legal entity, ie the body corporate, is the Malaysian Bar.

[8] Next, it is observed that s 137 of the Act provides:

137 Board and Bar to maintain an office.

(1) The Board and the Malaysian Bar shall each keep and maintain at all times an office and shall respectively publish in the Gazette the address of that office and any change of such address.

(2) All writs, plaints, notices, pleadings, orders, summonses, warrants or other written communications required or authorised or ordered to be served on or delivered or sent to the Board or the Malaysian Bar shall be deemed to be duly served, delivered or sent if left at the office of the Board or the Malaysian Bar, as the case may be.

[9] It is clear from s 137(1) therefore that:

(a) while in addition to the Legal Profession Qualifying Board and the Majlis Peguam there are State Bar Committees, Disciplinary Board and various other Committees set up under the Act, it is the Majlis Peguam that is created specifically for the proper management of the affairs of the Malaysian Bar as described in the Act; and

(b) the Act recognised two separate entities, ie the Malaysian Bar and the Legal Profession Qualifying Board.

[10] The fact that, except for the purposes of the Legal Profession Qualifying Board, the Act provides for deeming of service or delivery only to the Malaysian Bar fortifies the view that the only body that may undertake and defend legal action for and against the Malaysian Bar is the Malaysian Bar, represented by the Majlis Peguam pursuant to ss 42 and 47. In the light of a history of confusion, the terms Malaysian Bar and Majlis Peguam are used interchangeably. The Majlis Peguam of the Malaysian Bar is no less a 'party aggrieved' when the DB of the Malaysian Bar is prevented from carrying out its responsibilities than a party who is denied a right he is entitled to. The error learned judge fell into was to allow form to prevail over substance without first addressing the question whether the form affected substance.

[11] We would further observe that a closer attention to the very brief decision of Nik Hashim FCJ in *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor* [2008] 4 MLJ 1,; [2008] 4 CLJ 317 (FC) would disclose that the germane question to investigate for an objection is not so much the superficial question of the name that is used, but whether it was the DB or the Majlis Peguam itself who actually moved for the application to be commenced under the name of Majlis Peguam.

[12] From the writ of summons of 5 August 20008 and the summons in chambers of 21 October 2008, the apparent focus of concern appears to be the letter of complaint dated 30 October 2007 that had already been written by Ramasamy a/l Krishnan and Selvarajah a/l Krishnan to the DB. It became evident the investigation by the DC was the focus of concern when the drafts of the orders were served on the DC when the latter continued hearing on 17 February 2009. It is clear that the injunction was to prevent the DB from acting upon and the DC from investigating the complaint. The Majlis Peguam ought therefore to have been made a party.

[13] This is more so when the only party appearing before the learned judge are the respondents themselves. Learned judge fell into error twice. The first in overlooking the twin dangers inherent in a party appearing by and for itself at the hearing of the writ and the summons in chambers for judgment in default of appearance. The second in overlooking the same issue when he rejected the application by Majlis Peguam. That the defendants Ramasamy a/l Krishnan and Selvarajah a/l Krishnan were lackadaisical in the court proceedings or chose not to defend their legal rights in the court may warrant consideration by the DB, but they are irrelevant to the consideration of the application before the learned judge to amend the orders to enable the DB and the DC of the Malaysian Bar to carry out their statutory responsibilities to investigate and if warranted, to act upon a complaint by Ramasamy a/l Krishnan and Selvarajah a/l Krishnan to the DB.

[14] At the hearing of the appeal before us, the first respondent, appearing for the respondents, informed this court that there is a recent development, that the application by Ramasamy a/l Krishnan and Selvarajah a/l Krishnan to set aside the judgment in the High Court had been dismissed. It was submitted the doctrine of res judicata applied, that the suit was over, there is nothing to intervene and the DC remains restrained from proceeding.

[15] We were much taken up by the last argument. But upon reflection, we realised the argument is misleading. There merely appears to be nothing to intervene in the High Court now. But there was reason to intervene and to seek variation of the orders at the time the application was filed before the High Court, to enable the Majlis Peguam to carry out its statutory obligation to investigate a complaint by a client of a legal firm of improper conduct. That was the time when the learned judge erred. The last part of the submission, that the DB remains restrained, betrays the flaw in the argument there is nothing to intervene in.

[16] For the reasons above, the appeal was allowed with costs, and the decision of the High Court set aside.

Appeal allowed with costs.

Reported by Kanesh Sundrum